

THE HON'BLE SRI JUSTICE SANJAY KUMAR

CIVIL REVISION PETITION NO.3744 OF 2017

O R D E R

This civil revision petition under Article 227 of the Constitution arises out of the order dated 12.06.2017 passed by the learned V Additional Junior Civil Judge, Kukatpally at Miyapur, in I.A.No.34 of 2017 in O.S.No.293 of 2015. The said I.A. was filed by the petitioner herein, the plaintiff in the suit, under Order 26 Rule 9 CPC for appointment of an Advocate Commissioner to note down the physical features and measurements and to ascertain possession of the suit property, with photos. By the order under revision, the trial Court disallowed the plea of the petitioner/plaintiff.

Heard Sri Putta Krishna Reddy, learned counsel for the petitioner/plaintiff, and Sri U.Venkateswara Rao, learned counsel for the respondents/defendants.

Parties shall hereinafter be referred to as arrayed in the suit.

O.S.No.293 of 2015 was filed for a declaration that the plaintiff is the owner and possessor of the open place towards the eastern side, admeasuring 37.33 square yards, in front of the main door of his house, bearing No.3-5-75, Kukatpally Village and Municipal Circle, Balanagar Mandal, Ranga Reddy District; a perpetual injunction restraining the defendants from interfering with the said open place; and for costs.

The plaintiff's claim was that he was in possession of the said open place since his father's time. He obtained an *ex parte* ad interim injunction in the present suit against the defendants not to interfere with his possession over the same. However, the said order was vacated thereafter by the trial Court, allegedly on the assumption

that the defendants were in possession, relying upon the registered sale deed produced by them. The plaintiff claimed that the defendants made an attempt to occupy the suit open place and demolished part of the compound wall, in relation to which a FIR was registered. He further claimed that the defendants were never in possession of the suit open place, which was in front of his main door, and that their registered sale deed did not give them any right of possession. He claimed that it was necessary to resolve the issue by noting the physical features of the suit open place and ascertaining possession thereof with measurements. This plea was opposed by the defendants contending that a commission could not be appointed to ascertain possession in a suit claiming relief on the strength of alleged possession.

The trial Court took note of the settled legal position that appointment of a commission under Order 26 Rule 9 CPC could not be permitted to enable collection of evidence, as it is for the plaintiff to establish his case with relevant evidence, and opined that the I.A. was filed only for the purpose of fishing for evidence. The I.A. was accordingly dismissed.

Sri Putta Krishna Reddy, learned counsel, would place reliance on case law.

In **J.SATYASRI RAMBABU V/s. A.ANASUYA**¹, this Court observed that Courts would normally be reluctant to appoint a commission for noting down physical features of the suit property, particularly in a suit for injunction, as the same would amount to collecting evidence. It was further observed that this is not a hard and fast rule and if the Court, *prima facie*, finds that there is an

¹ 2005 (6) ALD 389

attempt on the part of one party to alter the physical features of the suit property, it would always be open to the Court to appoint a commission for inspection of such property.

In **DONADULU UMA DEVI V/s. GIRIKA KATAMAIAH @ BASAIAH²**, reference was made to **HARYANA WAKF BOARD V/s. SHANTI SARUP³**, wherein the Supreme Court observed that where there is a dispute or issue with regard to identity of a property in a litigation, it would be necessary to appoint a commission for localizing the property by taking assistance of a qualified surveyor and that the same would not amount to collecting evidence. This Court thereupon observed that identity of properties involved in litigation would have bearing, irrespective of the consequential relief sought for, be it a permanent injunction or a declaration. It was held that by that reason, no differentiation could be made while entertaining a plea for demarcation of the properties concerned.

In **BADANA MUTYALU V/s. PALLI APPALARAJU⁴**, this Court held that where there is a controversy as to identification, location or measurement of the land, local investigation should be done at an early stage, so that parties are aware of the report of the Commissioner and go to trial, prepared.

In **BANDI SAMUEL V/s. MEDIDA NAGESWARA RAO⁵**, this Court observed that where demarcation of disputed property is involved, it would be a fit case for appointment of a commission.

This Court however finds that none of the aforestated judgments advance or aid the plaintiff's case. There is no dispute presently as to identification or demarcation of the suit open place.

² 2013 (2) ALD 86

³ (2008) 8 SCC 671

⁴ 2013 (5) ALD 376

⁵ 2017 (1) ALD 582

According to the plaintiff, this piece of open land is in front of his main door and has been in his possession, whereas the defendants claim otherwise under a registered sale deed. Significantly, the plaintiff, having secured an *ex parte* injunction in the first instance could not sustain the same thereafter, as the said injunction order was vacated when the defendants placed their stand on record.

The prayer in the subject I.A. also assumes importance, in as much as the plaintiff not only seeks noting of physical features of the suit open place but also ascertainment of its possession. When one of his prayers in the suit is for a perpetual injunction restraining the defendants from interfering with his possession over this open place, it is not open to the plaintiff to collect evidence as to his alleged possession by way of a commission under Order 26 Rule 9 CPC. There is also no indication as to why he seeks noting of physical features of this open place.

Be it viewed from any angle, the endeavour of the plaintiff in seeking appointment of a commission is wholly unsustainable and tantamounts to collection of evidence. This Court therefore finds no grounds to interfere with the order passed by the trial Court holding to this effect.

The civil revision petition is devoid of merit and is accordingly dismissed. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

SANJAY KUMAR, J

19th JANUARY, 2018

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